Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	CC Docket No. 97-208
BellSouth Telecommunications, Inc., and	)	
BellSouth Long Distance, Inc., for	)	
Provision of In-Region, InterLATA	)	
Services in South Carolina	)	

COMMENTS OF U S WEST, INC. IN SUPPORT OF APPLICATION BY BELLSOUTH FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN SOUTH CAROLINA

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October 20, 1997

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SUMMARY

U S WEST supports BellSouth's determination that it is eligible to base its Application for authorization to provide interLATA services in the State of South Carolina on Track B. The record created by the South Carolina Public Service Commission ("SCPSC") demonstrates that BellSouth did not receive a qualifying request at least three months before filing the instant Application with this Commission. The SCPSC carefully documented the business plans of potential local providers and concluded that, although many had requested access and interconnection to BellSouth's network facilities, none of them planned to provide facilities-based telephone exchange service to business and residential subscribers and, accordingly, BellSouth had not received a qualifying request as provided in Section 271(c)(1)(B) of the Telecommunications Act of 1996.

U S WEST also opposes the Motion to Dismiss of AT&T Corp. and LCI International Telecom Corp. which was filed one day after BellSouth filed its Application. Their Motion to Dismiss is based upon what are now recognized to be incorrect assumptions about the controlling principles of law.

U S WEST's Comments are limited to these issues.

Comments of U S WEST, Inc.
BellSouth Corporation
State of South Carolina

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I. INTRODUCTION

U S WEST, Inc. ("U S WEST") submits these comments on behalf of its wholly-owned subsidiaries. They include an incumbent Bell operating company ("BOC")[1] as well as a cable TV company[2] who plans to provide local telecommunications services in competition with other local exchange carriers. The ownership of both incumbent and new entrant local service providers gives

[1] U S WEST Communications is an incumbent local exchange carrier in 14 western and midwestern states.

[2] Media One provides cable TV service in markets outside of U S WEST Communications' 14 states. Media One is the third largest cable operator in the continental United States.

U S WEST a unique perspective on the issues involving local market entry and the provision of interLATA services.

The Telecommunications Act of 1996 (the "Act") has two primary goals: competition in the local market and competition in the interLATA market. Congress designed the Act so that these goals are complementary.

Congress provided new entrants with choices for entering the local market. They have the ability to select the geographic and business markets they wish to enter and the services they wish to offer. They have the ability to construct and self-provision facilities, lease non-BOC facilities, purchase BOC unbundled network elements, resell BOC finished services, or utilize any combination of these.

BOCs who wish to enter the in-region interLATA market also have choices. Congress designed the Act to allow them to use approved agreements with qualifying competitive providers (Track A)[3] or a Statement of generally available terms and conditions ("SGAT") (Track B)[4] as the basis for meeting the checklist requirements to obtain authorization to provide in-region interLATA services. There is no "one size fits all."

This proceeding is about the business choices which new entrants have made in South Carolina which render BellSouth eligible to proceed under Track B to obtain interLATA authorization. This proceeding is also about an attempt by some

[3] 47 U.S.C. § 271(c)(1)(A).

[4] 47 U.S.C. § 271(c)(1)(B).

interexchange carriers to impose additional obligations on BellSouth as a condition to obtaining interLATA authorization.[5] However, Section 271(d)(4) of the Act clearly prohibits that.

II. THE RECORD CREATED BY THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION DEMONSTRATES THAT BELLSOUTH IS ELIGIBLE TO PROCEED UNDER TRACK B

BellSouth bases its South Carolina Application[6] on Track B. Because competitive providers have made the business decision not to take reasonable steps toward providing facilities-based service to business and residential customers, BellSouth has not received a "qualifying request" under Section 271(c)(1)(B) for access and interconnection and, therefore, it is permitted to proceed under Track B. U S WEST agrees with BellSouth's determination.

A. How Entry Into The Local Market Is To Be Accomplished Is A Choice Left To The New Entrant

One of the goals of the Act is to facilitate the introduction of competition into the local service market. The economic incentive offered by the Act to a BOC to facilitate such entry is authorization to provide in-region interLATA services.

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[5] See Motion of AT&T Corp. and LCI International Telecom Corp. to Dismiss BellSouth's 271 Application for South Carolina filed Oct. 1, 1997,("AT&T/LCI Motion To Dismiss").

[6] Application by BellSouth for Provision of In-Region, InterLATA Services In South Carolina, CC Docket No. 97-208, filed Sep. 30, 1997.

The Act permits a BOC to provide interLATA long distance services in an in-region state if the Federal Communications Commission ("Commission") makes the following findings:

(1) The BOC is providing access and interconnection pursuant to one or more agreements which meet the requirements in Section 271(c)(1)(A) ("Track A");[7]

or

The BOC is generally offering access and interconnection pursuant to a Statement of generally available terms and conditions ("SGAT") ("Track B");[8]

(2) Such access and interconnection meets the requirements of the checklist in Section 271(c)(2)(B);[9]

(3) InterLATA services will be provided by the BOC through a separate affiliate which meets the requirements of Section 272; and

(4) The provision of interLATA services by the BOC is consistent with the public interest, convenience, and necessity.[10]

B. Track B Is Available If A BOC Receives No "Qualifying Request"

BellSouth's South Carolina Application, based upon Track B, provides a perspective which has not previously been considered by the Commission, but which BOCs and state commissions may encounter on an increasingly widespread basis

[7] 47 U.S.C. § 271(c)(2)(A)(i)(I).

[8] 47 U.S.C. § 271(c)(2)(A)(i)(II).

[9] 47 U.S.C. § 271(c)(2)(A)(ii).

[10] 47 U.S.C. § 271(d)(3)(C).

throughout the nation as new entrants describe their business plans and strategies to enter the local market. While the Commission said in the Oklahoma Order[11] "we conclude that . . . consistent with its goal of developing competition, Congress intended Track A to be the primary vehicle for BOC entry in section 271," the record indicates that South Carolina is a state in which Track B is the primary vehicle. Track B becomes increasingly relevant based upon the business decisions of new entrants and how they choose to enter the local market.

In the Oklahoma Order, Track B was relegated to a modest, and ostensibly limited, exception which would rarely be available to a BOC:

> Congress intended Track B to serve as a limited exception to the Track A requirement of operational competition so that BOCs would not be unfairly penalized in the event that potential competitors do not come forward to request access and interconnection, or attempt to "game" the negotiation or implementation process in an effort to deny the BOCs in-region interLATA entry.[12]

The Commission based this conclusion on the relatively narrow exceptions recognized by the Act. Track B is available to a BOC: (i) if no competing provider of telephone exchange service to residential and business subscribers using either exclusively or predominantly its own facilities has requested the access and

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[11] Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, Memorandum Opinion and Order, 8 Comm. Reg. (P&F) 198, 211 ¶ 41 (1997) ("Oklahoma Order").

[12] Id. at 213 ¶ 46 (footnote omitted).

interconnection described in Section 271(c)(1)(A) at least three months before the BOC files its Application with the Commission,[13] (ii) if the state commission certifies that the only provider(s) making such a request have failed to negotiate in good faith,[14] or (iii) if the state commission certifies that the only provider(s) making such a request have failed to comply, within a reasonable period of time, with the implementation schedule contained in an agreement approved by the state commission.[15]

BellSouth has received numerous requests and has executed agreements with 83 different telecommunications carriers in South Carolina.[16] However, BellSouth says that none of the requests is a "qualifying request,"[17] because "no potential competitors are taking reasonable steps toward providing facilities-based

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[13] 47 U.S.C. § 271(c)(1)(B).

[14] 47 U.S.C. § 271(c)(1)(B)(i).

[15] 47 U.S.C. § 271(c)(1)(B)(ii).

[16] Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina filed Sep. 30, 1997, at 5 ("BellSouth Brief").

[17] In the Oklahoma Order, 8 Comm. Reg. at 207 ¶ 27, the Commission described the characteristics of what it called a "qualifying request" for purposes of foreclosing Track B and requiring a BOC to proceed under Track A:

> We conclude that a "qualifying request" under section 271(c)(1)(B) is a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A). . . . [S]uch a request need not be made by an operational competing provider . . . [r]ather, the qualifying request may be submitted by a potential provider of telephone exchange service to residential and business subscribers.

services to business and residential customers."[18] Accordingly, as BellSouth correctly observes:

> In deciding whether requesting carriers are reasonably proceeding toward providing facilities-based service to residential and business customers, the Commission's inquiry must address the state of local competition as of "3 months before the date the [Bell] company makes its application."[19]

In the Oklahoma Order, the Commission described some of the characteristics which a "competing provider" must exhibit, and other characteristics which are irrelevant, for purposes of determining whether a competing provider is reasonably proceeding toward providing the services described in Section 271(c)(1)(A):

- We . . . conclude that a "competing provider" cannot mean a carrier . . . that at present has in place at most paper commitments to furnish service. We find that the use of the term "competing provider[ ]" in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC in order to satisfy section 271(c)(1)(A).[20]

- For the purposes of section 271(c)(1)(A), the *competing* provider must actually be in the market, and, therefore, beyond the testing phase.[21]

- [T]he existence of an effective local exchange tariff [to provide both business and residential service] is not sufficient to satisfy section 271(c)(1)(A).[22]

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[18] BellSouth Brief at 10.

[19] Id. (citation omitted).

[20] Oklahoma Order, 8 Comm. Reg. at 203-04 ¶ 14.

[21] Id. at 204-05 ¶ 17 (footnote omitted).

[22] Id. at 205 ¶ 18 (citation omitted).

- Regardless of whatever state obligations a carrier may have, we cannot conclude for purposes of section 271(c)(1)(A) that a carrier is a competing provider of telephone exchange service to residential subscribers if it is not even accepting requests for that service.[23]

- [W]e also discount the significance of . . . media advertisements [and web sites] . . . listing certain services that . . . "might be attractive to residential customers" . . . .[24]

C. BellSouth Has Not Received A "Qualifying Request"

As of three months before the date on which the South Carolina Application was filed with this Commission, the South Carolina Public Service Commission (or "SCPSC") concluded that BellSouth had not received a "qualifying request." Notwithstanding the large number of requests and agreements between BellSouth and local service providers, BellSouth says that "[m]ost of the requests for negotiations that BellSouth has received are exclusively for resale of BellSouth's local services and thus could never lead to facilities-based Track A service."[25] Only three carriers have placed self-provided facilities in South Carolina.

One carrier, American Communications Services, Inc. ("ACSI"), installed facilities to provide access services, not telephone exchange services.

> Mr. Falvey testified on behalf of ACSI. Mr. Falvey testified that ACSI has placed facilities in several metropolitan area[s] of South Carolina, but is not providing facilities-based local exchange service.

[23] Id. at 205-06 ¶ 20.

[24] Id. at 206 ¶ 21.

[25] BellSouth Brief at 13 (emphasis in original).

> Mr. Falvey testified that ultimately ACSI intends to provide facilities-based local exchange service in South Carolina. However, Mr. Falvey conceded that ACSI has no current plan or commitment as to when local services may be provided. In direct testimony adopted by Mr. Falvey, ACSI stated that it had no intent to compete for residence customers in South Carolina.[26]

A second carrier, ITC DeltaCom, had some fiber-optic networks in place, but was not providing or taking any steps to provide facilities-based local exchange service.[27]

A third carrier, Time Warner Communications, has fiber routes in Columbia. However, it appears to have concentrated on providing service only to business customers.[28]

U S WEST agrees with BellSouth that the Commission must look to the state commission's assessment of the local market to determine whether a BOC has received a "qualifying request."[29] While the Commission said that it must "engage in a difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(A),"[30] the expertise to render this judgment lies with the state commission

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[26] South Carolina Public Service Commission's Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996, dated July 31, 1997, at 17-18 (July 31, 1997) ("SCPSC Order").

[27] BellSouth Brief at 14.

[28] Id.

[29] Id. at 11.

[30] Oklahoma Order, 8 Comm. Reg. at 217 ¶ 57 (footnote omitted).

for the following reasons. The state commission is responsible for: (i) licensing the competitive providers,[31] (ii) arbitrating disputes between the BOC and competitive providers with regard to access and interconnection,[32] (iii) approving interconnection agreements between the BOC and competitive providers,[33] (iv) enforcing the terms of interconnection agreements,[34] and (v) resolving disputes regarding implementation schedules.[35]

Since the enactment of the Act on February 8, 1996, some new entrants have begun to implement specific business plans to enter local markets. Not surprisingly, however, others have remained cautious and have provided the public media with only hints or suggestions of their business plans, and others have remained curiously silent.

Because each of the new entrants has the right under the Act to make its own business choices about how and when to enter the local market and because new entrants understandably may not disclose or share with the BOC their plans to provide residential and business services, or any service, in competition with the BOC, it is appropriate for the state commission to undertake an assessment of the

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[31] 47 U.S.C. § 253(b).

[32] 47 U.S.C. § 252(b)(1).

[33] 47 U.S.C. § 252(e)(1).

[34] Iowa Utilities Board v. FCC, 120 F.3d 753, 803-04 (8th Cir. 1997) ("Eighth Circuit Order").

[35] 47 U.S.C. § 271(c)(1)(B).

local market and to use its audit and investigatory authority to ascertain new entrants' plans and timetables for using their own facilities.

It is also of substantial assistance to this Commission if the factual record regarding local market conditions is made, as it was in South Carolina, before the BOC files its Application with the FCC. This then permits the Commission to devote its complete attention to the substantive merits of the Application. The Act requires the Commission to approve or deny an Application within 90 days.[36] However, based upon the demands placed upon the Commission's time during this narrow statutory window, the Commission has become increasingly concerned about meeting this mandate and it has recently revised its Procedures to enable it to manage more efficiently the Application review process.[37]

Because of these considerations, the state commission, rather than this Commission, is in a better position to conduct an assessment of the local market to determine whether a BOC has received a "qualifying request." The state commission is not subject to a time mandate and it is uniquely positioned to conduct the assessment because of its proximity to, and understanding about, the local providers in its state.

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[36] 47 U.S.C. § 271(d)(3).

[37] Public Notice, Revised Procedures For Bell Operating Company Applications Under Section 271 of the Communications Act, FCC 97-330, rel. Sep. 19, 1997, revising Public Notice, Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act, 11 FCC Rcd. 19708 (1996).

The South Carolina Application evidences this careful planning by BellSouth and the SCPSC. The SCPSC concluded:

> At this point in time, almost eighteen months after the passage of the 1996 Act, there is no facilities-based local competition in South Carolina. Furthermore, none of BST's potential competitors are taking any reasonable steps towards implementing any business plan for facilities-based local competition for business and residence customers in South Carolina.[38]

The record compiled by the SCPSC and this determination validate BellSouth's eligibility to proceed under Track B.

III. AT&T AND LCI's MOTION TO DISMISS SHOULD BE DENIED

On October 1, 1997, AT&T and LCI filed a Motion to Dismiss BellSouth's Application.[39] They contend that the Application is deficient on its face, inter alia, because BellSouth's SGAT does not make combinations of unbundled network elements ("UNEs") available to competitors at cost-based rates. Their objection is groundless.[40]

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[38] SCPSC Order at 18-19.

[39] See supra note 5.

[40] AT&T and LCI also contend that BellSouth's volume and term Contract Service Arrangements do not comply with Section 251(c)(4) of the Act, because these arrangements are not available to resellers at a wholesale rate and because they may only be offered by resellers to end user customers for whom the Contract Service Arrangements were developed. AT&T/LCI Motion To Dismiss at 17. However, this objection, too, is groundless. With regard to a service that is available to one category of subscribers, Section 251(c)(4)(B) permits the state commission to prohibit resellers from offering the service to a different category of

In the First Report and Order in the Local Interconnection Docket,[41] the Commission adopted rules which identified "a minimum list" of unbundled network elements that incumbent LECs must make available to new entrants upon request: local loops, network interface device, switching, interoffice transmission facilities, signaling networks and call-related databases, OSS functions, and operator services and directory assistance.[42]

Even though BellSouth's South Carolina SGAT explicitly complies with this requirement,[43] AT&T and LCI complain that BellSouth fails to provide existing combinations of network elements (i.e., what AT&T calls the "UNE Platform"). However, as the U.S. Court of Appeals for the Eighth Circuit recently held, the Act's

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subscribers. In approving BellSouth's SGAT, the SCPSC relied upon this statutory authority. Moreover, the fact that the SCPSC has not required BellSouth's Contract Service Arrangements to be offered to resellers at wholesale rates is answered by the Eighth Circuit's Order. The court said that the "Pricing Standards" in Section 252(d)(1)-(3) of the Act, which include the determination of wholesale rates, "undeniably authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." Eighth Circuit Order, 120 F.3d at 794. The court concluded that the Act grants the state commission, and not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act. Id. at 796.

[41] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499 (1996) ("First Report and Order"). The Commission also rejected suggestions to develop an "exhaustive list of required unbundled elements." Id. at 15624 ¶ 243.

[42] 47 C.F.R. § 51.319.

[43] BellSouth also says that unbundled network elements not specifically provided for in the SGAT are available through the Bona Fide Request Process. BellSouth Brief at 38.

language requiring incumbent LECs to provide UNEs "in a manner that allows *requesting carriers to combine* such elements," 47 U.S.C. § 251(c)(3), "unambiguously indicates that requesting carriers will combine the unbundled elements themselves."[44]

More significantly, the Eighth Circuit also specifically addressed any duty by incumbent LECs to provide existing combinations of network elements, including the UNE Platform. The court said:

> Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, § 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services.[45]

The Eighth Circuit initially vacated the Commission's rules[46] which required incumbent LECs, rather than the requesting carrier, to recombine network elements.[47] However, the court's action did not implicate the Commission's rule which required that incumbent LECs "not separate requested network elements that the incumbent LEC currently combines."[48] AT&T and LCI rely upon the

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[44] Eighth Circuit Order, 120 F.3d at 813 (emphasis in original).

[45] Iowa Utilities Bd v. FCC, No. 96-3321, Order on Petitions for Rehearing (8th Cir. Oct. 14, 1997) at 2 ("Eight Circuit Order on Petitions for Rehearing").

[46] 47 C.F.R. § 51.315(c)-(f).

[47] Eighth Circuit Order, 120 F.3d at 813.

[48] 47 C.F.R. § 51.315(b).

Eighth Circuit's initial failure to vacate this rule in support of their contention that incumbent LECs must, therefore, provide network elements on a combined basis.[49]

However, in its Order on Petitions for Rehearing entered on October 14, 1997, the Eighth Circuit corrected this when it vacated the Commission's rule, 47 C.F.R § 51.315(b), which prohibited an incumbent LEC from separating network elements that it may currently combine.[50] As a result of that Order, incumbent LECs are not obligated under the Act to provide existing combinations of network elements including the "UNE Platform."

AT&T and LCI also rely upon the Commission's Third Order On Reconsideration[51] where the Commission said that "although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined . . . ."[52] However, the Eighth Circuit's recent Order vacated that Commission rule.

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[49] AT&T/LCI Motion to Dismiss at 9-10.

[50] Eighth Circuit Order on Petitions for Rehearing at 2.

[51] AT&T/LCI Motion to Dismiss at 14, citing to In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Third Order On Reconsideration and Further Notice of Reconsideration, FCC 97-295, rel. Aug. 17, 1997 ("Third Order On Reconsideration").

[52] Id. ¶ 44.

AT&T and LCI also rely heavily upon the Commission's recent order denying Ameritech's Section 271 Application for the State of Michigan.[53] It is clear, however, that the Michigan Order can have no binding impact or legal effect on BellSouth's South Carolina Application. The Commission issued that order in response to Ameritech's Section 271 Application, and neither followed the proper procedures for, nor purported to conduct, a rulemaking of general applicability. It was an adjudicative order, not a set of rules governing the activities of any party but Ameritech. Accordingly, the Michigan Order may not serve as a basis for a motion to dismiss grounded in allegations of facial non-compliance since BellSouth is under no obligation to comply with that order.

To the extent that the Third Order On Reconsideration is construed to support AT&T and LCI's contention that BellSouth must provide combinations of UNEs, such an interpretation has been rejected by the Eighth Circuit's recent Order. Moreover, the Third Order on Reconsideration is also currently on appeal.[54]

Accordingly, even though BellSouth does not make available combinations of unbundled network elements which are sought by AT&T and LCI, the Eighth Circuit has held that incumbent LECs are not required to do so, and the

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[53] AT&T/LCI Motion To Dismiss at 4-6, 8, 10, 14, citing to In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, rel. Aug. 19, 1997 ("Michigan Order").

[54] Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (8th Cir.).

Commission should deny AT&T and LCI's Motion to Dismiss.

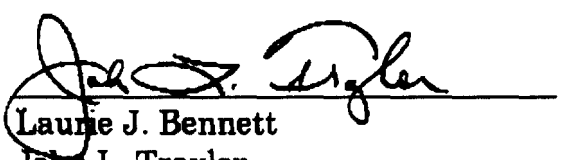
IV. CONCLUSION

Congress designed the Act to provide new entrants with choices about when and how they choose to enter the local market. The record created by the SCPSC demonstrates that many new entrants in South Carolina have made their business choices, and they have chosen not to enter the local market as facilities-based providers of business and residential telephone exchange service. Accordingly, BellSouth has not received a qualifying request, as provided in Section 271(c)(1)(B) of the Act, and BellSouth may proceed under Track B.

Moreover, BellSouth's Application is not facially defective, as alleged by AT&T and LCI, and the Commission should deny their Motion to Dismiss.

Respectfully submitted,

U S WEST, INC.

By: 

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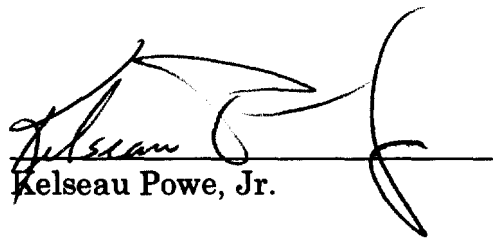
CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 20th day of October, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC. IN SUPPORT OF APPLICATION BY BELLSOUTH FOR PROVISION OF IN-REGION, INTERLATA SERVICES IN SOUTH CAROLINA*** to be served, via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.**



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*Pursuant to the September 30, 1997 and September 19, 1997 Public Notices (DA 97-2112 and FCC 97-330), an electronic version of this filing is submitted to the Office of the Secretary , on a 3x5 inch diskette, along with a cover letter.

**Served via hand-delivery.

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